

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM R. YOUNG
Claimant

VS.

SCHOOL SERVICES & LEASING
Respondent
Self-Insured

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Docket No. 228,961

ORDER

Claimant requests review of the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on January 27, 1998.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary benefits finding claimant failed to sustain his burden of proof that he suffered an accidental injury arising out of and in the course of employment and claimant failed to provide notice as required. Claimant requests review of that Order and raises the following issues:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent.
- (2) Whether claimant notified respondent of his alleged accident within the time prescribed by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the testimony given at the preliminary hearing, together with the exhibits admitted into evidence and the brief of the respondent, the Appeals Board finds for purposes of preliminary hearing that the Order of the Administrative Law Judge should be affirmed.

There is no medical evidence in the record concerning causation. In fact, as of the time of the January 27, 1998 preliminary hearing, claimant had not obtained medical treatment for his alleged October 24, 1997 injury.

Both claimant and David C. Schultz, the contract manager for the respondent company, testified at the preliminary hearing. Claimant stated that on Friday, October 24, 1997, he slipped on some loose dirt while walking to work on the respondent's premises and injured his back and hip. Claimant attempted to notify Mr. Schultz that day but he had already left the office. Claimant testified that he told Mr. Schultz about the alleged injury the following Monday. Mr. Schultz admits that claimant mentioned having hip pain when he spoke with claimant on October 27, 1997 but denies claimant reported an accident or a work-related injury. According to Mr. Schultz, respondent's first notice of any alleged work-related injury was when he received notice via certified mail on December 10, 1997.

Respondent points to certain inconsistencies in the record in support of its position that the injury is not work related. But the primary evidence in this regard is the fact that claimant did not miss work due to the injury, never sought medical treatment on his own, and did not request medical treatment from respondent before the letter dated December 8, 1997 from claimant's attorney.

The notice issue involves other contradictions in the record. Claimant testified that he did not report his injury on the day it happened because neither his supervisor, Mr. Schultz, nor the dispatcher were in the office when he went in at the end of the day. But the assistant dispatcher was there and claimant did not report his alleged accident to her. Also, claimant never tried calling the office or otherwise attempted to reach Mr. Schultz or the dispatcher. Furthermore, when claimant did tell Mr. Schultz about his injury the following Monday, it was not until after claimant was advised by Mr. Schultz that he was being terminated. Even then he did not describe the injury as work related.

Due to the conflicting testimony, the credibility of the witnesses becomes an important consideration. The Administrative Law Judge apparently found claimant to be the less credible witness because he denied benefits. In weighing the evidence and considering the credibility of the witnesses, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the witnesses testify. He, therefore, had a unique opportunity to judge their demeanor and assess their credibility. Accordingly, the Appeals Board takes into consideration the Administrative Law Judge's findings in this regard. Giving some deference to the conclusions of the Administrative Law Judge and based upon our review of the record as a whole, the Appeals Board finds the preponderance of the evidence supports a conclusion claimant's injury did not arise out of and in the course of his employment and that notice thereof was not timely given.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish dated January 27, 1998 should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
Douglas C. Hobbs, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director